Supreme Court, U.S.
FILED
117 (1) 08 929 JAN 22 2009
OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

CHRISTOPHER COOK and LEIDRA COOK,
Petitioners,

v.

AVI CASINO ENTERPRISES, INC., a corporation; IAN DODD; JUAN MAJIAS; STEPHANIE SHAIK; DEBRA PURBAUGH; and ANDREA CHRISTENSEN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress authorizes Indian tribes and their corporations to provide alcoholic beverages in Indian country, subject to complying with state laws and with verified, published tribal ordinances.[1] And in this area, no tradition of tribal sovereignty exists.[2] A tribal-incorporated casino over-served its own employee, who caused a motor-vehicle collision resulting in amputation of a motorcyclist's leg and other life-threatening injuries. Does the tribal sovereign-immunity doctrine bar a dram-shop lawsuit against the tribal corporation and its employees?

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[1] 18 U.S.C. § 1161 (Federal laws banning sale and possession of liquor in Indian country "shall not apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.").

[2] *Rice v. Rehner*, 463 U.S. 713, 725 (1983) (finding "no tradition of sovereign immunity that favors the Indians in this respect").

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding before this Court are:

The petitioners: Christopher Cook and Leidra Cook.

The respondents: Avi Casino Enterprises, Inc., a corporation, Ian Dodd, Juan Mejia, Stephanie Shaik, Debra Purbaugh, and Andrea Christensen.

Under Rule 29.6, Rules of the Supreme Court, Petitioners state that they and all Respondents are individuals and not corporations, with the exception of Avi Casino Enterprises, Inc.—a corporation that the Fort Mojave Indian Tribe wholly owns and that was incorporated under its tribal ordinance.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to review the United States District Court for the District of Arizona's and the United States Court of Appeals for the Ninth Circuit's incorrect dismissal of this case under the doctrine of tribal sovereign immunity.

OPINIONS AND ORDERS BELOW

Petitioners ask this Court to review:

(1) The Arizona federal district court's December 13, 2006 final order granting summary judgment to the Respondents.

(2) The Ninth Circuit's November 14, 2008 opinion. *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

JURISDICTION

On November 14, 2008, the Ninth Circuit affirmed the United States District Court for the District of Arizona's order dismissing this case under the federal doctrine of tribal sovereign immunity.[3] The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Rules 10 and 13(1), Rules of the Supreme Court.

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[3] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1161 – The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STANDARD OF REVIEW

For two separate reasons, review is de novo. First, federal courts review de novo questions of tribal sovereign immunity.[4] Second, appellate courts review de novo a district-court dismissal for lack of subject-matter jurisdiction.[5]

STATEMENT OF THE CASE

1. Introduction.

For this Court, this is a case of first impression and great importance. It tests whether a tribal corporation operating under and subject to state liquor laws has blanket immunity from common-law dram-shop liability under the tribal sovereign-immunity doctrine.

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[4] *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002).

[5] *Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007).

The Ninth Circuit says "Yes." But federal statutes and this Court's prior cases indicate "No." Moreover, in September 2008, the Oklahoma Supreme Court emphatically said "No."[6] Resolving this important question of federal law—and ending the conflict between the Ninth Circuit and the Oklahoma Supreme Court—are the two main reasons why this Court should grant the Petition for Writ of Certiorari.

2. The Tribe incorporated Avi Casino. Under an agreement with Nevada, Avi Casino gained the right to serve liquor.

Fort Mojave Indian Tribe ("Tribe") incorporated Avi Casino Enterprises, Inc. ("Avi Casino") to run a casino in Nevada.[7] A tribal business-corporation ordinance empowered Avi Casino as a for-profit, separate corporation that could sue and be sued—and that could function within and without tribal borders.[8] A separate tribal liquor ordinance that the Tribe

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[6] *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008).

[7] "Restated Articles of Incorporation of Avi Casino Enterprises, Inc.," Exh. 2 to *Plaintiffs' Supplemental Response to Defendants' Motion to Dismiss* (Aug. 5, 2005), Docket No. 25.

[8] Fort Mojave Indian Tribe Corp. Ord., § IV(b) ("Each corporation shall have power: (b) To sue and be sued, complain and defend, in its corporate name."); § IV(j) (April 24, 1986) ("Each corporation shall have power: To conduct its business, carry on its operations and have offices and exercise the powers granted by this Ordinance, within or without the tribal reservation boundaries."); § XXV(c) ("The corporation, at any time during the liquidation of its business and affairs, may make application to a court of competent jurisdiction to have the liquidation continued under the supervision of the tribal court."), Exh. 3 to Docket No. 25.

published in the *Federal Register* made it unlawful for the casino to sell liquor to any person apparently under the influence of alcohol.[9] Nevada granted licenses letting Avi Casino sell liquor in Nevada subject to state law.[10] That set the stage for the May 25, 2003 collision.

3. Avi Casino negligently over-served its own employee, took her to her car, and sent her out onto the highway—where she caused the accident.

Andrea Christensen was an Avi Casino cocktail waitress.[11] In the evening of May 24—and into the morning of May 25, 2003—she attended another casino employee's birthday party at the casino. Ian Dodd and Debra Purbaugh were among the casino employees encouraging drinking at the party. Dodd, the on-duty manager, announced that drinks were "on the house." Christensen was off-duty. Purbaugh and other casino

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[9] Fort Mojave Indian Tribe, Liquor Ord. No. 52, 60 FED. REG. 54078, 54082, § 3.1(A)(3) (Oct. 19, 1995) ("It shall be a violation of this Ordinance: . . . For any person to sell liquor to a person apparently under the influence of alcohol, or other deleterious substances.").

[10] "Liquor Licensing Intergovernmental Agreement by and between the Fort Mojave Indian Tribe and Clark County, Nevada (Sept. 29, 2005)," Exh. 5 to Docket No. 25.

[11] The facts are taken from *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 720-22 (9th Cir. 2008), which summarized the complaint's facts. Dist. Ct. Docket No. 1. Because the trial judge granted the motion to dismiss, appellate courts must presume that the complaint's facts are true. *Wah Chang v. Duke Energy Trading and Mktg.*, 507 F.3d 1222, 1224 n. 1 (9th Cir. 2007).

employees violated state and tribal law by serving alcoholic beverages to Christensen after she was obviously intoxicated.

Casino employees then placed Christensen on a casino-run shuttle bus and took her to the employee parking lot, so she could drive to her Arizona home. She headed north onto Aztec Road within Arizona. Moments after leaving the lot, Christensen swerved across the center line and slammed her car into Chris Cook, who was driving his motorcycle south on the same road. The accident caused amputation of Cook's left leg and over $1 million in medical bills. At about 4:30 in the morning of May 25, 2003—shortly after the crash—Christensen had a 0.25% blood-alcohol reading. In Arizona's Mohave County Superior Court, Christensen pled guilty to aggravated assault and driving under the influence. The Arizona superior court sentenced her to four years in Arizona state prison.

4. The district-court case against the casino corporation and its employees ended in dismissal based on the doctrine of tribal sovereign immunity.

Cook and his wife sued Avi Casino and its known culpable employees in Arizona federal district court. (The Cooks also sued the same defendants in Arizona superior court. The superior court dismissed that complaint for lack of personal jurisdiction and for lack of subject matter jurisdiction (based on tribal sovereign immunity). On March 20, 2008, the Arizona

Court of Appeals affirmed the dismissal.[12] The Arizona Supreme Court denied the Cooks' petition for review on October 28, 2008.[13] The Cooks are contemporaneously filing a Petition for Writ of Certiorari concerning the state-court matter, and ask that this Court consolidate and grant both Petitions.).

In the Arizona federal district-court case, the Cooks sought compensatory and punitive damages for negligence and dram-shop liability under state and tribal law. The defendants, except for Christensen, first moved to dismiss for alleged lack of diversity jurisdiction. Dodd and Purbaugh were Arizona citizens, although the other employees—and the Cooks—were California citizens. The district court dismissed the claims against the California employees. The district court refused to dismiss Avi Casino, finding that it had dual status: (1) as a California citizen (because the Tribe had incorporated it there and the Tribe's headquarters was in California), and (2) as a Nevada citizen, because the casino's principal place of business was in Nevada.

The Arizona citizen-employees, Dodd and Purbaugh, then filed a second motion to dismiss, alleging that as Avi Casino employees, the Tribe's sovereign immunity shielded them. And they argued that the Tribe's sovereign immunity should extend to Avi Casino—a tribal corporation. The district court granted the motion, holding that the Tribe's sovereign

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[12] *Cook v. Avi Casino Enters., Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0110, 2008 WL 4108121 (March 20, 2008).

[13] *Id.*

immunity covered Avi Casino since the corporation functioned as an arm of the Tribe. It further held that tribal sovereign immunity covered Dodd and Purbaugh, since they were supposedly tribal employees acting within the scope of their employment. Although Christensen remains a defendant in the action, the district court entered a separate judgment dismissing Avi Casino, Dodd, and Purbaugh. The Cooks then appealed to the Ninth Circuit.

5. The Ninth Circuit found that Avi Casino was a Nevada resident, but affirmed dismissal based on the doctrine of tribal sovereign immunity.

The Ninth Circuit made three main findings: (1) For diversity-jurisdiction purposes, the casino was a Nevada citizen. (2) Since Avi Casino was acting as an arm of the Tribe, the doctrine of tribal sovereign immunity protected it. (3) That immunity extended to the casino employees. The Ninth Circuit thus affirmed the trial-court dismissal.[14] The Cooks then filed this timely Petition.

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[14] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

REASONS FOR GRANTING THE PETITION

1. The *Cook* decision conflicts with the Oklahoma Supreme Court's 2008 decision in *Bittle v. Bahe*. That conflict creates a difference in tribal-entity law that supports accepting the Petition.

On November 14, 2008, the Ninth Circuit filed its decision in this case. But on September 16, 2008, the Oklahoma Supreme Court denied rehearing in a decision reaching the opposite conclusion—but on the same operative facts. That conflicting decision is *Bittle v. Bahe*.[15]

In *Bittle*, the Absentee-Shawnee Tribe of Oklahoma had incorporated Thunderbird Entertainment, Inc. to own and operate the Thunderbird Casino under Oklahoma state gambling and liquor licenses. The plaintiff sued the casino and the Tribe in state trial court in Pottawatomie County, Oklahoma—seeking damages for personal injuries suffered in a motor-vehicle accident caused by one of the casino's customers. As in *Cook*, the impaired customer's car had swerved over the center line. And as in *Cook*, casino personnel had served liquor to the customer despite his obvious intoxication. And so the plaintiff asserted state-law dram-shop liability against both the tribal corporation and against the Tribe. The trial court and the Oklahoma Court of Appeals held that

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[15] *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008).

the tribal corporation and the Tribe were immune from suit under the doctrine of tribal sovereign immunity.[16]

But the Oklahoma Supreme Court disagreed. It held that the words "laws of the state" in 18 U.S.C. § 1161 include laws providing for state common-law dram-shop liability. It also held that, in any event, the tribal casino corporation, by obtaining an Oklahoma state license to serve alcoholic beverages at the casino, had waived any tribal sovereign immunity it might have had to suit in state courts—including a common-law negligence action for dram-shop liability.[17]

The conflict between the Ninth Circuit and the Oklahoma Supreme Court matters because of the large number of federally-recognized Indian tribal entities in their respective jurisdictions. As of April 4, 2008, the Bureau of Indian Affairs recognized 562 tribal entities.[18] And Oklahoma contains 37 of them:

Absentee-Shawnee Tribe of Indians of Oklahoma
Alabama-Quassarte Tribal Town, Oklahoma
Apache Tribe of Oklahoma
Caddo Nation of Oklahoma
Cherokee Nation, Oklahoma
Cheyenne and Arapaho Tribes, Oklahoma
(formerly the Cheyenne-Arapaho Tribes of Oklahoma)
Chickasaw Nation, Oklahoma

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[16] *Id.* at 812-14.

[17] *Id.* at 816-28.

[18] *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 73 FED. REG. 18553-01 (April 4, 2008).

Choctaw Nation of Oklahoma
Citizen Potawatomi Nation, Oklahoma
Comanche Nation, Oklahoma
Delaware Nation, Oklahoma
Eastern Shawnee Tribe of Oklahoma
Fort Sill Apache Tribe of Oklahoma
Iowa Tribe of Oklahoma
Kaw Nation, Oklahoma
Kialegee Tribal Town, Oklahoma
Kickapoo Tribe of Oklahoma
Kiowa Indian Tribe of Oklahoma
Miami Tribe of Oklahoma
Modoc Tribe of Oklahoma
Muscogee (Creek) Nation, Oklahoma
Osage Nation, Oklahoma (formerly the Osage Tribe)
Ottawa Tribe of Oklahoma
Otoe-Missouria Tribe of Indians, Oklahoma
Pawnee Nation of Oklahoma
Peoria Tribe of Indians of Oklahoma
Ponca Tribe of Indians of Oklahoma
Quapaw Tribe of Indians, Oklahoma
Sac & Fox Nation, Oklahoma
Seminole Nation of Oklahoma
Seneca-Cayuga Tribe of Oklahoma
Shawnee Tribe, Oklahoma
Thlopthlocco Tribal Town, Oklahoma
Tonkawa Tribe of Indians of Oklahoma
United Keetoowah Band of Cherokee Indians in Oklahoma
Wichita and Affiliated Tribes
(Wichita, Keechi, Waco & Tawakonie), Oklahoma
Wyandotte Nation, Oklahoma

On the other hand, the nine states within the Ninth Circuit are home to 421 tribal entities—229 in Alaska, and 192 in Arizona, California, Idaho, Montana,

Nevada, Oregon, and Washington.[19] (Hawaii apparently has no tribal entities.)

Because of the Oklahoma Supreme Court's decision in *Bittle v. Bahe*, state dram-shop common law will apply to the 37 tribal entities in Oklahoma, but will *not* apply to the 421 tribal entities in the Ninth Circuit. That is precisely the kind of direct conflict that Supreme Court Rule 10(a) identifies as a reason for accepting a Petition for Writ of Certiorari.

2. The Ninth Circuit's *Cook* opinion has decided an important question of federal law concerning the limits of the doctrine of tribal sovereign immunity over liquor transactions. The Court has not yet settled that question—but should settle it now.

The Ninth Circuit decided that tribal corporations are immune from state common-law, dram-shop liability under the doctrine of tribal sovereign immunity. This Court has approached—but has never directly addressed and settled—that recurring, expanding, and important question of federal law. It should do so now. Indeed, Supreme Court Rule 10(c) indicates that this sort of unresolved, important federal legal question supports accepting a Petition for Writ of Certiorari.

This Court's 1983 decision in *Rice v. Rehner* is the key to understanding the meaning and application of the doctrine of tribal sovereign immunity for tribal

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[19] *Id.*

corporations furnishing liquor.[20] In *Rice*, Eva Rehner—a Pala Tribe member and federally-licensed Indian trader—ran a general store on the Pala Reservation in San Diego, California. Under 18 U.S.C. § 1161, the Pala Tribe had an ordinance permitting sale of liquor on the reservation. When Rehner asked California for an exemption from its license requirement to sell liquor for off-premises consumption, California denied the request. Rehner filed a declaratory-judgment action in federal district court, which held that 18 U.S.C. § 1161 required a state license, and dismissed the petition.[21] The Ninth Circuit affirmed.[22]

This Court recognized that the judiciary had consistently construed federal statutes as reserving the tribal right to self-government and also recognized the recent trend toward a preemption analysis to determine whether a state could regulate activity within an Indian reservation. Thus, *Rice* approached the preemption analysis through the following concepts: (1) the goal of preemption analysis is to determine the congressional plan; (2) in preemption analysis, the tradition of tribal sovereignty forms the backdrop for reading federal statutes; (3) tribal sovereignty, as a backdrop, informs the preemption analysis but does not determine preemption; (4) in preemption analysis, the role of tribal sovereignty varies with the traditions that accommodate tribal interests and the federal government on the one hand

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[20] *Rice v. Rehner*, 463 U.S. 713 (1983).

[21] *Id.* at 715-17.

[22] *Rehner v. Rice*, 678 F.2d 1340 (9th Cir. 1982).

and the state on the other; (5) if tradition has recognized a tribal sovereign immunity in favor of the Indians, then state law is preempted unless Congress expressly provides otherwise; and (6) if there is no tradition of tribal sovereign immunity favoring the Indians, preemption analysis may accord less weight to the backdrop of tribal sovereignty.[23]

Rice held that tradition had *not* recognized an inherent sovereign right of Indians or Indian tribes to regulate liquor.[24] In fact, the tradition, since early colonial times, had been a complete prohibition against liquor in Indian country. That prohibition is still in place—subject to suspension conditioned on compliance with state law and tribal ordinance.[25] Thus, *Rice* recognized state and federal concurrent jurisdiction over alcoholic beverages in Indian country and *no* tradition of tribal sovereignty with respect to alcoholic beverages.[26]

According to *Rice*, the state's interest in controlling liquor justified the "historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country."[27] After all, a state has an "unquestionable interest" in

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[23] *Rice v. Rehner*, 463 U.S. 713, 718-20 (1983).

[24] *Id.* at 722.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 724.

controlling liquor traffic within its borders.[28] In fact, a "'state's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.'"[29] (The state regulatory interest in the Cooks' case was substantial. As this case showed once more, negligent service of alcohol will often proximately cause terrible off-reservation effects.)

Rice concluded that there was "no doubt that Congress has divested the Indians of any inherent power to regulate in this area."[30] Indeed, in this area, Congress had passed no laws "demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."[31] Thus, for regulating liquor transactions, Indian tribes do not "'possess the usual accouterments of tribal self-government.'"[32] Thus, there is no "*single* notion of tribal sovereignty" serving to direct any preemption analysis involving Indians.[33] Since there is no tradition of sovereign immunity favoring Indians in the regulation of liquor—and the sale of liquor potentially has a substantial impact beyond the reservation—*Rice* accorded "little if any

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[28] *Id.*

[29] *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973)).

[30] *Id.* at 724.

[31] *Id.*

[32] *Id.* (quoting *McClanahan v. Ariz. St. Tax Comm'n*, 411 U.S. 164, 167-68 (1973)).

[33] *Id.* at 724.

weight to any asserted interest in tribal sovereignty" in this area.

As for 18 U.S.C. § 1161, *Rice* found a congressional intent (1) to remove the discriminatory federal prohibition against intoxicating liquor in Indian country, (2) to have state laws of their own force govern tribal liquor transactions, and (3) to require Indians to comply with state liquor laws in every regard.[34] *Rice* explained that Congress wanted to legalize Indian liquor transactions, but only if they conformed both with tribal ordinance *and* state law. Thus, the tribes, the states, and the federal government now share concurrent jurisdiction over tribal liquor sales. And so Congress had authorized – and *not* preempted – state regulation over Indian liquor transactions.

The point is that Congress knew that Indians never enjoyed a tradition of tribal self-government for liquor transactions. Congress also knew that the states had concurrent authority over regulating and prohibiting liquor transactions. By passing 18 U.S.C. § 1161, Congress meant to delegate part of *its* authority to the tribes and to the states. That would "fill the void" created when the federal ban on Indian liquor ended. As this Court held in *Rice*, "Congress did *not* intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations."[35] Thus applying state law

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[34] *Id.* at 726-27.

[35] *Id.* at 733 (quoting *Rehner v. Rice*, 678 F.2d 1340, 1352 (9th Cir. 1982) (Goodwin, J., dissenting) (emphasis added)).

to liquor transactions does not interfere with federal policies concerning reservations.

Applying the doctrine of sovereign tribal immunity here would make the tribal corporation a "super citizen" that can trade in heavily-regulated alcoholic beverages, free from state judicial oversight and, indeed, free from all but self-imposed regulation.[36] The specific concern in *Rice* was whether a reservation retail outlet had to have a state license to sell liquor. But *Rice* is the controlling authority, since it concluded that Indians lack inherent attributes of sovereignty to regulate in the area of alcoholic beverages. *Rice* held that the Indians there had *no* tribal immunity from state alcoholic beverage law. While the parties in *Cook* are *not* seeking to nullify the Fort Mojave Indian Tribe's sovereign immunity, *Rice* stands for the proposition that there are limits to the scope and application of that sovereign immunity. This case is a step beyond those limits. Here, *Rice* supports the focused exercise of state dram-shop common law against the negligent tribal corporation and its culpable employees.

3. State common-law dram-shop liability forms part of the "laws of the State" to which Indian-country sales of liquor must conform.

Avi Casino may contend that 18 U.S.C. § 1161 does not apply because it fails to mention state common law. But 18 U.S.C. § 1161 requires that Indian-country liquor transactions must conform both with the "laws of the State" where the act or transaction

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[36] *Id.* at 734.

occurs and with a properly-certified and legally-published tribal ordinance. Assuming the truth of the Cooks' complaint, Avi Casino and its employees violated the tribal ordinance by serving liquor to the obviously-intoxicated tribal-employee driver.[37]

That leaves the question whether state dram-shop common law falls within the "laws of the State" mentioned in 18 U.S.C. § 1161. The phrase "laws of the State" in that statute is comprehensive and unqualified. Moreover, this Court's *Rice* opinion held that the words "laws of the State" in 18 U.S.C. § 1161 "include state authority over alcoholic beverages whether it is legislative, executive, or adjudicative in nature."[38] State courts recognizing dram-shop liability have held that the common law supports and reinforces statutory and regulatory control of liquor.[39] Indeed, dram-shop liability becomes a part of state

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[37] *See* Fort Mojave Indian Tribe, *Liquor Ord. No. 52*, 60 Fed. Reg. 54078, 54082, § 3.1(A)(3) (Oct. 19, 1995) ("It shall be a violation of this Ordinance: . . . For any person to sell liquor to a person apparently under the influence of alcohol, or other deleterious substances.").

[38] *Bittle v. Bahe*, 192 P.3d 810, 823 (Okla. 2008).

[39] *See, e.g.*, *Rappaport v. Nichols*, 156 A.2d 1, 10 (N.J. 1960) (Recognizing common-law, dram-shop liability "will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care.").

law—as much a part of state law as state conflict-of-law principles.

Avi Casino and its employees will probably argue that Nevada recognizes no common-law dram-shop liability.[40] But that involves a conflict-of-law question to resolve under Nevada and Arizona conflict rules.[41] Three things are clear: First, this case is in Arizona federal district court. Second, the Arizona federal district court must resolve any conflict-of-law issues.[42] Third, Arizona emphatically recognizes common-law dram-shop liability.[43] In fact, Arizona has a

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[40] *Snyder v. Viana*, 916 P.2d 170, 178 (Nev. 1996) ("For decades, the law in Nevada has been that no such action lies because this court will not judicially enact a Dram Shop law.").

[41] *See, e.g., Gen. Motors Corp. v. Eighth Judicial District Court of State of Nevada ex rel. County of Clark*, 134 P.3d 111, 113 (Nev. 2006) ("We conclude that the most significant relationship test, as provided in the Restatement (Second) of Conflict of Laws section 145, should govern the choice-of-law analysis in tort actions unless a more specific section of the Second Restatement applies to the particular tort claim."); *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, 307, 63 P.3d 1040, 1044 (App. 2003) ("Cases sounding in tort should be resolved under the law of the state having the most significant relationship to both the occurrence and the parties with respect to the particular issue.").

[42] *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (A federal district court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits.); *Lindsey v. Clossco*, 642 F. Supp. 250, 254 (D. Ariz. 1986) ("This Court must follow the conflict of laws rule of the State of Arizona, the state in which this Court is located.").

[43] *See, e.g., Ontiveros v. Borak*, 136 Ariz. 500, 511, 667 P.2d 200, 211 (1983) ("[T]hose who furnish liquor have an obligation or "duty" to exercise care for the protection of others. This is an

substantial interest in applying its laws to an accident: (1) that occurred within its jurisdiction; (2) where its criminal courts sentenced the drunk driver and its prisons incarcerated her; (3) that concerned people traveling within Arizona; (4) that involved medical care and treatment provided in Arizona; and (5) that implicated a wider problem of unsafe liquor service impacting Arizona residents and visitors. Applying Nevada and Arizona conflict-of-law rules is a problem for the trial judge to resolve *after* this case is remanded.

4. This Court's 1998 *Kiowa Tribe* opinion does not require applying the doctrine of tribal sovereign immunity to this liquor liability case.

The Ninth Circuit believed that the 1998 *Kiowa Tribe* opinion required it to apply the doctrine of tribal sovereign immunity in favor of the tribal corporation.[44] In *Kiowa Tribe*, the tribe—and not a tribal corporation—executed a promissory note to buy stock in a commercial enterprise. A clause in the note stated that it did not subject or limit the sovereign rights of the tribe. When the tribe defaulted, the note-holder sued the tribe in state court. *Kiowa Tribe* held that (1) tribal immunity is a matter of federal law not subject

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obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons, whether such injury occurs on or off the premises. We find that duty both as a matter of common law and of statute.").

[44] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 725-26 (9th Cir. 2008) (discussing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)).

to diminution by the states; (2) under federal law, an Indian tribe is subject to suit only where Congress has authorized or the tribe has waived immunity; and (3) Congress had not dispensed with or limited the rule of tribal immunity from suit. *Kiowa Tribe* held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."[45]

But *Kiowa Tribe* does not apply here, because this case does not: (1) concern a lawsuit against a tribe; (2) involve a contract; (3) affect tribal membership; (4) affect a tribe's right to govern its members; (5) interfere with a tribe's internal affairs; or (6) interfere with tribal government. The Cooks have simply alleged that a tribal corporation caused terrible injuries by negligently serving an obviously-intoxicated casino employee-patron and then taking her to her car so she could drive onto the highway.

Indeed, in *Kiowa Tribe*, both the majority and the dissent disparaged the reasoning and the result. And that further shows why sovereign immunity should not go beyond the limits this Court has set. The *Kiowa Tribe* majority noted that this Court had retained the doctrine of tribal sovereign immunity "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-

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[45] *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

sufficiency."[46] But aside from abrogation, this Court retains the right to define and limit a doctrine that it—and not Congress—developed and imposed. Indeed, the majority itself found "reasons to doubt the wisdom of perpetuating the doctrine."[47] After all, immunity can harm and deny a remedy to those "who have no choice in the matter, as in the case of tort victims."[48] The dissent agreed that the rule was "unjust"—especially so for "tort victims who have no opportunity to negotiate for a waiver of sovereign immunity."[49] Governments—like individuals—"should be held accountable for their unlawful, injurious conduct."[50] That is particularly true for liquor control, where federal, state, and tribal authorities share jurisdiction—and share the duty to protect the public.

This Court has always advanced the strong federal interest in ensuring that all citizens have access to courts.[51] Under our system of dual sovereignty, there is an historical and constitutional assumption of state-court jurisdiction concurrent with the federal courts.[52]

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[46] *Id.* at 757.

[47] *Id.* at 757.

[48] *Id.* at 757-58.

[49] *Id.* at 766 (Stevens, J. dissenting).

[50] *Id.*

[51] *Three Affiliated Tribes of the Fort Berthold Res. v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one.").

[52] *Nevada v. Hicks*, 533 U.S. 353, 390 (2001)

Neither *Kiowa Tribe* nor any other United States Supreme Court decision supports stretching the doctrine of tribal immunity to cover injury caused by a tribal corporation's violation of statutes, regulations, and common law.

5. The Fort Mojave Indian Tribe waived tribal sovereign immunity which, in any event, does not apply to this separate, incorporated business entity.

The doctrine of tribal sovereign immunity does not apply to this dram-shop common-law lawsuit. But even if it did, the Fort Mojave Indian Tribe has waived any immunity-based protection for Avi Casino and its culpable employees. The Tribe incorporated Avi Casino to operate a casino—with an essential part of the operation being service of alcohol. After all, a Nevada casino unable to serve alcohol would operate at a huge disadvantage, because for casinos, liquor and gambling are inseparable. The incorporation occurred under a tribal ordinance empowering business operations on and off the reservation, and granting to Avi Casino the power to sue and be sued.[53]

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[53] Fort Mojave Indian Tribe Corp. Ord., § IV(b) ("Each corporation shall have power: (b) To sue and be sued, complain and defend, in its corporate name."); § IV(j) (April 24, 1986) ("Each corporation shall have power: To conduct its business, carry on its operations and have offices and exercise the powers granted by this Ordinance, within or without the tribal reservation boundaries."); § XXV(c) ("The corporation, at any time during the liquidation of its business and affairs, may make application to a court of competent jurisdiction to have the liquidation continued under the supervision of the tribal court."), Exh. 3 to Docket No. 25.

The Ninth Circuit slighted the sue-and-be-sued clause, but it is part of the tribal incorporation ordinance, was part of the record on appeal, and should have a part in the analysis here.[54] The clause reinforces the tribal corporation's separate nature and its amenability to suit when it harms others.[55] But even ignoring the sue-and-be-sued clause, the Tribe created a separate legal entity to obtain the legal right to furnish intoxicating beverages under the laws of the State of Nevada.

The Cooks did not sue the Tribe. They sued the separate corporation that the Tribe had created to manage the casino and to furnish liquor at the reservation. Under 18 U.S.C. § 1161, Indian tribes can *only* furnish liquor in Indian country in a way conforming both with a proper tribal ordinance and "with the laws of the State" where the liquor is

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[54] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 727 n. 6 (9th Cir. 2008).

[55] *See, e.g., Odgen v. Iowa Tribe of Kan. & Neb.*, 250 S.W.2d 822, 828 (Mo. App. 2008) ("The language indicating that a corporation can 'sue and be sued' is boilerplate language for a typical business corporation. Most corporations do not enjoy any immunity and are amenable to suit in United States state and federal courts. In a typical corporate charter, the 'sue and be sued' language indicates that the corporation is an entity in and of itself that can sue and be sued if a dispute arises."); Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 50 (2001) ("If a tribal corporation is not immune, it is because it has included a so called 'sue and be sued' clause in its corporate charter.").

furnished.[56] That was Nevada, which required that the alcohol service be made through a legitimate corporation.[57] And so the Tribe set up that corporation. It may have been tightly controlled for the Tribe's benefit, but it was a separate legal entity—recognized as such by the State of Nevada.

A corporation is a legal reality—not a legal fiction.[58] Even if the Tribe is immune, it created a separate corporation to secure the right to furnish alcohol on Indian country in Nevada—and to reap the resulting financial benefits. But the Tribe now wants to ignore

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[56] 18 U.S.C. § 1161 (Anti-Indian-liquor laws such as 18 U.S.C. § 1154 "shall not apply . . . within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.").

[57] *See* Nevada Gaming Commission, *In the Matter of Avi Casino Enterprises, Inc.* (Licensure), File No. SD-125, Second Revised Order of Licensure at ¶ 4 (Nov. 20, 1997) (The Fort Mojave Indian Tribal Council is registered "as a holding company for Avi Casino Enterprise, Inc."); NEV. REV. STAT. § 463.485(1) ("'Holding company' means any corporation, firm, partnership, limited partnership, limited-liability company, trust or other form of business organization not a natural person which, directly or indirectly: (a) Owns; (b) Has the power or right to control; or (c) Holds with power to vote, any part of the limited partnership interests, interests in a limited-liability company or outstanding voting securities of a corporation which holds or applies for a license.").

[58] "It leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true." *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930).

that same corporate form—and equate the Tribe with the corporation and its employees. That mocks the separate corporate form that the Tribe so assiduously created—and denies any remedy to the Cooks.[59]

The American theory of sovereignty rejects the idea that a government can create an apparently independent corporation enjoying the ability "to injure others, confident that no redress may be had against it as a matter of right."[60] Indeed, cloaking Avi Casino and its employees with sovereign immunity violates the congressional policy of encouraging tribal enterprises to enter commerce on an *equal* footing with other businesses.[61] That sort of immunity shields corporations and their employees from any wrongs they may commit—such as negligent casinos over-serving patrons, incompetent hospitals killing their patients, shady manufacturers marketing deadly

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[59] *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F. Supp. 599, 603 (D. Mont. 1981) ("Regardless of the sovereign source from which a corporate entity derives its charter, when it is constituted with all of the required formalities it comes into existence as a legal entity. As a legal entity, it is susceptible to suit on its contracts in any court of competent jurisdiction unless it enjoys some legal excuse, e.g., sovereign immunity. While the court recognizes that an Indian tribe is not a citizen of the state of Montana, it is not a tribe that is being sued.").

[60] *Namekagon Dev. Co., Inc. v. Bois Forte Res. Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). *See also Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1137 (D. Alaska 1978) ("Only with the potential for imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status.").

[61] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).

products, vicious newspapers defaming anyone they please, and banks defrauding their customers. If they are tribal corporations, they can commit any tort they want, and no one can sue them. That cannot be what Congress or this Court ever envisioned for separate tribal-incorporated businesses. And as 18 U.S.C. § 1161 proves, that especially cannot be true for torts arising from negligently and illegally furnishing alcoholic beverages.

CONCLUSION

Petitioners respectfully ask the Court to grant their Petition for Writ of Certiorari, to vacate the Ninth Circuit's opinion, to vacate the judgment against them, and to remand this case to federal district court for trial on the merits of their claims against Avi Casino and its liable employees.

Respectfully Submitted,

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January 2009

APPENDIX

APPENDIX A

United States Court of Appeals
Ninth Circuit

No. 07-15088

[Filed November 14, 2008]

Christopher COOK; Leidra Cook,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
AVI CASINO ENTERPRISES, INC., a corporation; Ian Dodd; Juan Majias; Stephanie Shaik; Debra Purbaugh; Andrea Christensen,	)
	)
Defendants-Appellees.	)
	)

Bradley L. Booke, Moriarity Badaruddin & Booke, Las Vegas, NV, for the plaintiffs-appellants.

Theodore A. Julian, Jr., Burch & Cracchiolo, P.A., Phoenix, AZ, for the defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Paul G. Rosenblatt, District Judge, Presiding. D.C. No. CV-04-01079-PGR.

Before: FERDINAND F. FERNANDEZ, RONALD M. GOULD, and CARLOS T. BEA, Circuit Judges.

Opinion by Judge GOULD; Concurrence by Judge GOULD; Partial Concurrence and Partial Dissent by Judge FERNANDEZ.

GOULD, Circuit Judge:

Plaintiff Christopher Cook ("Cook"), a California resident, seeks recovery for damages suffered as a result of a motor vehicle accident in which, while on a motorcycle, he was hit by a drunk driver. The driver was an employee of defendant Avi Casino Enterprises, Inc. ("ACE"), a tribal corporation, and she allegedly became intoxicated at an Avi Casino function. Cook sued the tribal corporation and several of its employees, alleging negligence and dram shop liability. Defendants asserted defenses based on federal Indian law. Defendants claim (1) that there is an absence of subject matter jurisdiction because the Indian tribe that owns ACE is, like Cook, a California citizen and (2) that tribal sovereign immunity shields ACE and its employees from suit.

We affirm the district court, in part on alternate grounds supported by the record. We agree with Cook that we have jurisdiction over ACE because there is diversity of citizenship. However, we affirm the dismissal of Cook's claims against ACE on the alternate ground of tribal sovereign immunity. We affirm the district court's dismissal of defendants Ian Dodd ("Dodd") and Debra Purbaugh ("Purbaugh") on the same ground and do not reach Defendants' other arguments for dismissal.

I

A

Christopher Cook seeks relief because employees of Avi Casino gave an intoxicated fellow employee free drinks, then drove her to her car; she drove her car into Cook minutes later.[1] Andrea Christensen ("Christensen"), a cocktail waitress at Avi Casino, attended a nighttime birthday party at the casino for another employee. Defendants Ian Dodd and Debra Purbaugh were among the casino employees at the party, during which Dodd, the on-duty manager, announced that drinks were "on the house." Christensen was off-duty, and Purbaugh served her alcoholic beverages after she was obviously intoxicated.

Defendants let Christensen board a casino-run shuttle bus to the employee parking lot so that she could drive home. Christensen headed north on Aztec Road, which was located within the Fort Mojave reservation. Leading to the tragic accident, Cook was driving his motorcycle southbound on the same road; he was heading home after visiting his mother-in-law. Minutes after leaving the parking lot, Christensen swerved across the center line and hit Cook's

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[1] Facts regarding the accident are taken from Cook's complaint. Because the district court dismissed Cook's claims pursuant to Federal Rule of Civil Procedure 12(b)(1), alleged facts not relating to subject matter jurisdiction are assumed to be true. *Wah Chang v. Duke Energy Trading and Marketing*, 507 F.3d 1222, 1224 n.1 (9th Cir. 2007).

motorcycle.[2] Cook suffered catastrophic injuries, including the loss of his left leg, resulting in more than $1,000,000 in medical expenses. Christensen pled guilty to aggravated assault and driving under the influence and was sentenced to four years in Arizona prison. She is not a party to this appeal.

B

Avi Casino is owned and operated by Avi Casino Enterprises, Inc., a corporation organized under the Fort Mojave Business Corporation Ordinance, which is a tribal law of the Fort Mojave Indian Tribe (the "Tribe"). The Tribe is a federally recognized Indian tribe, and its reservation spans California, Nevada, and Arizona. The Tribe's seat of government is in Needles, California, but Avi Casino is located on reservation lands in Nevada, and ACE's headquarters is in Laughlin, Nevada. Avi Casino operates under an intergovernmental agreement between the Tribe and the state of Nevada that permits the Tribe to operate casinos on tribal lands within the state.

ACE is wholly owned and controlled by the Tribe. ACE shareholder functions are performed by the Fort Mojave Tribal Council on behalf of and for the benefit of the Tribe. A majority of ACE's board of directors must be Tribe members. ACE's articles of incorporation state that all capital surplus not used for corporate development must be deposited in the Tribe's general fund.

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[2] By 4:30 a.m. the following morning, Christensen had a blood alcohol content of at least 0.25 percent.

C

Cook sued ACE, Christensen, Dodd, Purbaugh, and other casino employees in Arizona federal district court. Cook sought compensatory and punitive damages for negligence and dram shop liability under Arizona's liquor liability statute and Fort Mojave tribal law.

All defendants but Christensen filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), claiming a lack of diversity jurisdiction. Cook argued that Dodd and Purbaugh were citizens of Arizona but conceded that the other employees named in the complaint were, like Cook, California citizens. On Cook's recommendation, the district court dismissed all claims against these other employees, as well as claims against 25 unnamed defendants. Defendants argued that ACE was a citizen of California because it was incorporated under tribal law and the Tribe's headquarters were in Needles, California. The district court agreed, applying traditional corporate citizenship analysis under 28 U.S.C. § 1332(a). The court determined that ACE was a citizen of Nevada because its principal place of business, the casino, was located there; the court also ruled that ACE was a California citizen because it was incorporated by the Tribe, and the Tribe's headquarters were in California.

Dodd and Purbaugh then filed a second motion to dismiss, alleging that as ACE employees they were shielded from liability by the Tribe's sovereign immunity, which should extend to ACE and Avi Casino. The district court granted the motion, concluding that the Tribe's sovereign immunity covered ACE because the corporation functioned as an

arm of the Tribe. It further held that the tribal sovereign immunity covered Dodd and Purbaugh as tribal employees acting within the scope of their employment. Although Christensen remains a defendant in the action, the district court entered a separate judgment dismissing ACE, Dodd, and Purbaugh. Cook appealed.

II

We review *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Rattlesnake Coalition v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007). Factual findings relevant to subject matter jurisdiction are reviewed for clear error. *Id.* We also review *de novo* questions of tribal sovereign immunity. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). We may affirm a district court's judgment of dismissal on any grounds supported by the record. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1019 (9th Cir. 2007). Here, we may affirm the district court's dismissal on diversity jurisdiction or tribal sovereign immunity grounds. We address both.

III

A

We have jurisdiction only if Cook, a resident of California, has citizenship which is diverse from that of every defendant. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (stating that diversity jurisdiction requires "complete diversity of citizenship"). As the party asserting jurisdiction, Cook has the burden of proving such

diversity exists. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The parties agree that defendants Dodd and Purbaugh have citizenship diverse from Cook. The key question is whether ACE, a tribal corporation, is like Cook a citizen of California.

An Indian tribe or an unincorporated arm of a tribe is not a citizen of any state. *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002). However, our case law offers little help in determining the citizenship of an Indian corporation created under tribal law. In *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, we asserted in dictum that "[t]here is authority for the proposition that for purposes of diversity jurisdiction, an Indian corporation is a citizen of the state in whose borders the reservation is located." 873 F.2d 1221, 1226 (9th Cir. 1989). If so, then ACE would be a citizen of California, Arizona, and Nevada because the Fort Mojave reservation spans all three states. On closer inspection, however, we conclude that there is no such "authority" for this principle as so broadly stated. To support its reasoning, *Stock West* relied on three decisions of our circuit, all of which held that a tribal corporation is a citizen of the state where it has its principal place of business. *See R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (stating that tribal corporation had its "principal place of business in Montana"); *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F.Supp. 599, 602-03 (D.Mont. 1981) (stating that tribal corporation "has its principal and only place of business in the state of Montana" and "[a]ccordingly, it is a citizen of the state for purposes of diversity jurisdiction"); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F.Supp. 1127,

1138 (D.Alaska 1978) ("As [tribal corporation's] only major business activities, and situs, are located in Alaska it is an Alaskan corporation for diversity purposes."). The tribal reservation in each of those cases was located in only one state, the same state as the tribal corporation's principal place of business. We agree with the district court's rejection of the dictum of *Stock West*. If *Stock West* stands for anything on this matter, it is that a tribal corporation is a citizen of the state where it has its principal place of business. *See* William C. Canby, Jr., American Indian Law 223 (4th ed. 2004) ("A tribe may, however, charter a tribal corporation that becomes a citizen of the state of its principal place of business...."). But the parties agree that ACE's principal place of business is in Nevada, which by itself does not destroy diversity.

We are left with what the district court called "an absolute dearth of case law" on this issue. District Court Order at 6. We find some guidance, however, in our decision in *American Vantage*. Although there we analyzed diversity jurisdiction over an unincorporated casino, we stated that an entity incorporated under tribal law "is the equivalent of a corporation created under state or federal law for diversity purposes." *American Vantage*, 292 F.3d at 1099 n. 8. We conclude that a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation.

Under the federal diversity statute, a corporation is a citizen of (1) "any State by which it has been incorporated" and (2) "the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). ACE is a Nevada citizen because its principal place of business is there. Defendants claim that ACE is also a

citizen of California because it was incorporated at the tribal seat of government in Needles, California. The district court agreed, finding that under the Fort Mojave Business Corporation Ordinance ACE was incorporated by the tribal secretary, and Cook offered no evidence to indicate that the tribal secretary performed these acts anywhere besides tribal headquarters.

However, even if it is true that the tribal secretary performed the acts of incorporation in California, ACE is not a California citizen. The district court stated that a corporation is a citizen of "any state *where* it was incorporated." District Court Order at 6 (emphasis added) But more preciseiy, under 28 U.S.C. § 1332(c)(1), a corporation is a citizen of the "state *by which* it has been incorporated" (emphasis added). *Cf. Thomson v. Gaskill,* 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction."). We have not focused on this difference in the past when analyzing non-tribal corporations. *See Industrial Tectonics, Inc. v. Aero Alloy,* 912 F.2d 1090, 1092 (9th Cir. 1990) ("For the purposes of diversity jurisdiction, a corporation is a citizen of any state *where* it is incorporated ....") (emphasis added). Here, however, the distinction is critical. A corporation is a creature of a political entity. As a tribal corporation, ACE was organized under the laws of the Fort Mojave Tribe, which is a separate sovereign independent from state control. *See American Vantage,* 292 F.3d at 1096 ("Rather than belonging to state political communities, [tribes] are distinct independent political communities. Tribes also owe no allegiance to a state.") (citations omitted). ACE is governed by tribal, not state, corporate law, and

from the state's perspective a tribal corporation is much like a foreign corporation. *Id.* ("Indian tribes fall under nearly exclusive federal, rather than state, control.").[3] ACE was not incorporated by virtue of state law, nor does ACE owe its continuing existence to the state law chartering corporations. Instead, ACE's creation and continuance is a function of tribal law. Although ACE might have been physically present "in" the state of California when it was created by the Tribe, it was not created "by" California, as is required by the diversity statute to establish citizenship. ACE instead was created by the Tribe.

There is no conflict between our analysis and the established rule that a tribal corporation is a citizen of the state where it has its principal place of business. While a corporation is a citizen of the state "by which" it was created, it is also a citizen of the state "where" it has its principal place of business. 28 U.S.C. § 1332(c)(1). The principal place of business clause refers to location and does not require formative action by or authority of a state leading to creation of a corporation. Avi Casino is located inside the state of Nevada, and the business activities of ACE are primarily in Nevada. By contrast, the incorporation of ACE, its creation and continuation, is a tribal matter, an incident of tribal sovereignty.

We hold that, for diversity purposes, a tribal corporation formed under tribal law is not a citizen of

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[3] Our treatment of tribal corporations as distinct sovereign entities does not imply that Indian tribes themselves are foreign states. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (stating that an Indian tribe is not a foreign state).

a state merely because its incorporation occurred inside that state. ACE is thus only a citizen of Nevada, the location of its principal place of business. We therefore conclude that we have subject matter jurisdiction over this case because none of the defendants are citizens of California.[4]

B

Even though we have diversity jurisdiction, we must nonetheless dismiss any defendants who are protected by the Fort Mojave Tribe's sovereign immunity.

A sovereign can assert immunity "at any time during judicial proceedings." *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999). We have occasionally considered the issue *sua sponte*. *See id.* Yet even when a party does not invoke sovereign immunity until appeal, it does not waive immunity unless it voluntarily invokes jurisdiction or makes "a 'clear declaration' that it intends to submit itself to jurisdiction." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). We will entertain a sovereign immunity defense so long as a defendant provides "fair warning ... before the parties and the court have invested substantial resources in the case." *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999).

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[4] We need not address Cook's claims that ACE was actually incorporated in Arizona.

ACE has objected to our jurisdiction since the beginning. The tribal corporation did not raise a tribal immunity defense initially and chose instead to pursue a dismissal on diversity jurisdiction grounds. Nonetheless, Cook has had fair warning of ACE's tribal immunity argument because that immunity is central to the defense of Dodd and Purbaugh, which on appeal was argued together with ACE's diversity claims. *See id.* at 758. For this reason, we treat the issue as having been fairly raised.

Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This immunity applies to the tribe's commercial as well as governmental activities. *Id.* at 754-55, 118 S.Ct. 1700. The parties do not dispute that the Fort Mojave Tribe itself is protected by sovereign immunity, but they disagree on whether ACE enjoys immunity as a tribal corporation.

Cook insists that tribal corporations competing in the economic mainstream should not enjoy the same immunity from suit given to Indian tribes themselves. Cook claims it is unfair to allow tribes to create commercial corporations that can compete in the marketplace while enjoying immunity from the legal liability that all other corporations must face, and he asserts that granting tribal corporations immunity is unnecessary to protect tribal autonomy and self-government. Cook cites language used by district courts in our circuit and others showing a reluctance to extend immunity to tribal business enterprises. *See, e.g., Parker Drilling Co. v. Metlakatla Indian*

Cmty., 451 F.Supp. 1127, 1137 (D.Alaska 1978) ("Only with the potential for imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status."); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F.Supp. 23, 29 (D.Minn.1974) ("It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit ...." (quoting *Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y.1920))).

Cook's policy arguments are not without some insight but are foreclosed by our precedent. The Supreme Court has somewhat grudgingly accepted tribal immunity in the commercial context. *Kiowa*, 523 U.S. at 758, 118 S.Ct. 1700 ("There are reasons to doubt the wisdom of perpetuating [tribal immunity].... [T]ribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce."). However, the Court has also stated that restrictions on tribal immunity are for Congress alone to impose. *Id.* at 760, 118 S.Ct. 1700. And the settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself. We reaffirmed this rule in *Allen*, which involved very similar facts to those raised here. 464 F.3d 1044. In that case, a former tribal casino employee sued the casino for various employment violations. We held that whether tribal immunity extends to a tribal business entity depends not on "whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be

those of the tribe." *Id.* at 1046. We noted that the tribe authorized the casino through a tribal ordinance and interstate gaming contract, that the economic advantages created by the casino "inure[d] to the benefit of the Tribe," and that "[i]mmunity of the casino directly protect[ed] the sovereign Tribe's treasury." *Id.* at 1046-47 We concluded that the casino functioned as "an arm of the Tribe" and accordingly enjoyed tribal immunity. *Id.* at 1047.

The record supports the district court's conclusion that ACE and Avi Casino function as an arm of the Fort Mojave Tribe.[5] As in *Allen*, here the Tribe created ACE pursuant to a tribal ordinance and intergovernmental agreement, and the tribal corporation is wholly owned and managed by the Tribe. Cook does not contend otherwise. Also as in *Allen*, the economic benefits produced by the casino inure to the Tribe's benefit because ACE's articles of incorporation state that all capital surplus from the casino shall be deposited in the Tribe's treasury and because the Tribe, as the sole shareholder, enjoys all of the benefits of an increase in the casino's value. A majority of ACE's board must be Tribe members, and the Tribe's council performs corporate shareholder functions for the benefit of the Tribe.

Despite his vigorous arguments that, as a matter of policy, tribal corporations should be held to lack

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[5] We see no importance in the distinction that here ACE is a tribal corporation while the casino in *Allen* may have been unincorporated. *See American Vantage*, 292 F.3d at 1099 ("A tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so."). *See also Canby*, *supra*, at 101-02 ("Incorporation by itself does not waive immunity.").

sovereign immunity, Cook does not persuasively distinguish *Allen's* holding that these entities already do have sovereign immunity, an issue squarely presented and decided in *Allen*. Cook does not discuss *Allen* in his brief, and his response at oral argument was that he was prevented from finding factual distinctions from *Allen* by an incorrect discovery order. But we see no evidence in the record of Cook's objection to the discovery order, nor was the issue preserved for appeal. Moreover, the cases Cook cites in support of his position acknowledge a tribal entity's sovereign immunity and concern only whether the entity had waived that immunity. *See, e.g., Parker Drilling*, 451 F.Supp. at 1137. Cook does not contend that ACE has waived tribal immunity.[6]

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[6] In a decision subsequently vacated in pertinent part, we once held that a "sue and be sued" clause in a tribal enabling ordinance may waive tribal immunity in entities created under that ordinance. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974, 978-83 (9th Cir. 2006). Although we later vacated that holding on tribal exhaustion grounds, so as to facilitate an initial review of the issue by tribal court, we did not disavow or reject our initial and now vacated analysis. *Marceau v. Blackfeet Hous. Auth. (Marceau III)* 540 F.3d 916, 921 (9th Cir. 2008). Accordingly, the issue whether a "sue and be sued" clause in a tribe's enabling ordinance effectuates a waiver of tribal sovereign immunity remains a live issue for determination in this circuit. ACE's enabling ordinance states that corporations formed by the Tribe may "sue and be sued" in their corporate name. Writing while *Marceau I* was still in effect, the district court noted that ACE might have waived sovereign immunity but declined to analyze the issue because Cook did not raise it. Cook has not raised this issue on appeal either, and so we will not decide the issue. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

Allen controls this case and we hold that as a tribal corporation and an arm of the Fort Mojave Tribe, ACE enjoys sovereign immunity from Cook's suit.

C

The final question is whether ACE's tribal immunity extends to two of its employees, defendants Dodd and Purbaugh. We conclude that it does. Tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). In these cases the sovereign entity is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Regents of the University of California v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Applying this principle to tribal rather than state immunity, we have held that a plaintiff cannot circumvent tribal immunity "by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983). Cook alleges in each substantive count of his complaint that Dodd and Purbaugh acted in the course and scope of their authority as casino employees.

We have not yet addressed whether tribal immunity extends beyond tribal officials to employees of a tribe acting in their official capacity and within the scope of their authority, but we have extended federal sovereign immunity to employees of the United States. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) ("[S]overeign immunity cannot be

avoided by naming officers and employees of the United States as defendants."). The Second Circuit addressed this issue and saw no relevant difference between tribal employees and officials. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) ("[Plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority."). We reach the same conclusion. The principles that motivate the immunizing of tribal officials from suit-protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official-apply just as much to tribal employees when they are sued in their official capacity. Here, Cook has sued Dodd and Purbaugh in name but seeks recovery from the Tribe; his complaint alleges that ACE is vicariously liable for all actions of Dodd and Purbaugh. Plaintiffs such as Cook cannot circumvent tribal immunity through "a mere pleading device." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority. Cook has sued Dodd and Purbaugh in their official capacity only, and thus the district court correctly dismissed them from this suit.

IV

Our conclusion that Cook has established diversity jurisdiction does not change the outcome. The district court properly dismissed Cook's claims against ACE and individual defendants Dodd and Purbaugh

because all these defendants are protected by tribal sovereign immunity. Each party shall bear its own costs on appeal.

AFFIRMED.

GOULD, Circuit Judge, concurring:

I am sorry to say that the austerity of our jurisprudence concerning tribal sovereign immunity leaves me with the conclusion that an unjust result is reached that our law might better preclude. As the case comes to us, we see Christopher Cook, catastrophically injured as the result allegedly of gross and culpable negligence of Avi Casino's employees. However, our precedent under *Allen* makes clear that so long as Avi Casino Enterprises was acting as an arm of the Tribe, which appears to be the case, it gains a tribal sovereign immunity commensurate with that of the Tribe itself. From this, it follows in logic that involved casino employees, when sued in corporate capacity for torts committed in the course of employment, also gain immunity. This leaves Mr. Cook without a remedy against Avi Casino for his grave injuries under our law, even if his assertions of negligence by casino employees are correct.

In my view it would be desirable if (1) the United States Supreme Court on review were to establish a new rule limiting tribal sovereign immunity in this gaming context; or (2) the Congress were to pass new legislation limiting the sovereign immunity of tribal entities involved in ubiquitous commercial gaming activities across the United States; (3) the Tribe itself were to take responsibility for its casino employees' actions, and affirmatively waive sovereign immunity

in this case permitting Cook's action to be resolved under a litigated adversarial process. Alternatively, my concerns would be alleviated if one were to hold that the "sue and be sued" clause in a tribal enabling ordinance effectuated a waiver of tribal sovereign immunity (an issue we think not raised on Cook's appeal).

Lest it appear that I am offering a general challenge to the concept of sovereign immunity for Indian tribes, I clarify that is not my aim. I have no disagreement with applying the doctrine of sovereign immunity to any important actions of Indian tribes, their officials, corporate arms, and employees when those actions are aimed at matters of governance of the Indian nation or policy matters that are critical to their continuation as a tribe. However, I question whether that doctrine can sensibly be applied to actions wholly commercial in the gaming area where the tribe has undertaken to compete and to provide services for the general public. In this sphere our law can be modified to ensure that the needs of justice for injured individuals limit the scope of the sovereign immunity doctrine for Indian tribes engaged in commercial gaming activities.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts IIIB and C of the majority opinion and in the result.

I do not concur in part IIIA. To the extent that it is necessary to opine on diversity jurisdiction, which it probably is not, I do not agree that there is diversity. We know that a tribe is not a foreign state. *See Stock*

W., Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. 1989). We know that a tribe is neither a state nor a citizen of a state, but we treat tribal corporations that way for diversity purposes. *See Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n. 1 (9th Cir. 2002); *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 982-83 (9th Cir. 1983). We also know that corporations are usually citizens of the state of incorporation and of the state where their principal place of business is located. *See* 28 U.S.C. § 1332(c)(1); *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). We also know that this court has further indicated that, in general, a tribal corporation is a citizen of the state (here three states) within whose boundaries the reservation is located. *See Stock W.*, 873 F.2d at 1226. While the majority rejects the latter proposition, it is one simple way to resolve the question before us and is no more fictional than the approach adopted by the majority. Finally, if we are going to apply the usual corporate diversity rule, I see no principled basis for accepting the fiction that for diversity purposes a corporation that has its principal place of business (here its only place of business) on tribal property has its principal place of business in a state (Nevada), while rejecting the fiction that for diversity purposes a state "where" the corporation was incorporated (here the tribal headquarters in California) is a corporation "of" that state even though it was not incorporated by that state (California). *See Indus. Tectonics*, 912 F.2d at 1092 ("a corporation is a citizen of any state where it is incorporated."). Especially is that true where the corporation, as here, is an arm of the tribe.

Therefore, I respectfully concur in part and dissent in part.

APPENDIX B

United States District Court
D. Arizona

No. CV-04-1079-PCT-PGR

[December 13, 2006]

Christopher COOK, et ux.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
AVI CASINO ENTERPRISES, INC., et al.,	)
Defendants.	)
	)

Bradley L. Booke, Edward P. Moriarity, Moriarity, Gooch, Badaruddin & Booke LLC, Salt Lake City, UT, for Plaintiffs.

John Dean Curtis, II, Theodore A. Julian, Jr., Burch & Cracchiolo PA, Laurence Randall Sharlot, Jennings, Haug & Cunningham LLP, Phoenix, AZ, for Defendants.

ORDER

PAUL G. ROSENBLATT, United States District Judge.

On November 7, 2006, defendants Avi Casino Enterprise, Inc., Mejia, Shaik, Dodd, and Purbaugh ("the tribal defendants") filed a one-sentence Notice of Lodging of Proposed Form of Judgment (doc. # 61), together with a proposed form of final judgment as to them that contains language invoking Fed.R.Civ.P. 54(b). The underlying basis for the proposed Rule 54(b) judgment is the Court's orders that dismissed the tribal defendants from this action pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction.

The Court initially notes that the manner in which the tribal defendants are seeking a Rule 54(b) judgment is improper. While parties may "request" that a separate judgment be entered, Fed.R.Civ.P. 58(d), such a request involves the filing of an appropriate motion that is accompanied by a memorandum of points and authorities that explains why the request is factually and legally appropriate. *See* Fed.R.Civ.P. 7(b)(1) and LRCiv 7.2(b). The requirement for such a motion in the context of seeking a Rule 54(b) judgment is particularly appropriate because certification under Rule 54(b) is an extraordinary measure that is not to be granted as a matter of course, *Curtiss Wright Corp. v. General Electric Co.*, 446 U.S. 1, 5, 100 S.Ct. 1460, 1466 (1980), and the Ninth Circuit has mandated that the district courts should not direct entry of a Rule 54(b) judgment unless they first make specific findings setting forth the reasons for their order. *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). The effect of the tribal defendants' failure to properly submit their Rule 54(b) request is that the Court must expend

scarce judicial resources doing their counsels' work for them.[1]

Notwithstanding the lack of a proper request for a Rule 54(b) judgment, the Court finds that there is no just reason for delaying the entry of a separate judgment of dismissal in favor of the tribal defendants. First, a Rule 54(b) judgment is necessary in order to finally dispose of the claims against the tribal defendants at this time inasmuch as this case is still ongoing as to defendant Christensen. Second, the Court has entered a final order (doc. # 38) dismissing all of the claims against defendants Avi Casino Enterprise, Inc., Mejia, and Shaik for lack of diversity of citizenship jurisdiction, and has entered a final order (doc. # 60) dismissing all of the claims against defendants Dodd and Purbaugh pursuant to the doctrine of tribal sovereign immunity. Third, since the discrete subject matter jurisdiction issues underlying the dismissal of the tribal defendants are not applicable to defendant Christensen, the early entry of a separate judgment as to the tribal defendants will not require the Ninth Circuit to address those legal

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[1] To the extent that the wording of the proposed form of judgment submitted by the tribal defendants is their attempt to comply with the *Morrison-Knudsen* requirements, it is unavailing because the inclusion in the form of judgment of the Court's prior findings regarding the lack of subject matter jurisdiction violates Fed.R.Civ.P. 54(a) ("A judgment shall not contain a recital of pleadings, . . . or the record of prior proceedings.")

issues again if Christensen subsequently appeals.[2] Therefore,

IT IS ORDERED that the Clerk of the Court shall enter a judgment of dismissal in favor of defendants Avi Casino Enterprise, Inc., Ian Dodd, Juan Mejias, Stephanie Shaik, and Debra Purbaugh pursuant to Fed.R.Civ.P. 54(b) inasmuch as all claims against these defendants have been dismissed for lack of subject matter jurisdiction and there is no just reason for delay.

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[2] The Court notes that it interprets the plaintiffs' comments in the Joint Status Report (doc. # 63) to mean that the plaintiffs do not object to the entry of a Rule 54(b) judgment.

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(2)

No. 08-929

Supreme Court, U.S.
FILED
MAR 2 6 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHRISTOPHER COOK and LEIDRA COOK,

Petitioners,

v.

AVÍ CASINO ENTERPRISES, INC., a corporation; IAN DODD; JUAN MAJIAS; STEPHANIE SHAIK; DEBRA PURBAUGH; and ANDREA CHRISTENSEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Ninth Circuit Court of Appeals properly affirmed disposition of Petitioners Cooks' claims based upon sovereign immunity.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties originally named in the case. Defendant Christensen is not a party to the appeal.

DISCLOSURE STATEMENT PER RULE 29.6

Aví Casino Enterprises, Inc. is a corporation formed pursuant to the authority of an ordinance of the Fort Mojave Indian Tribe and wholly owned by the Tribe. There is no parent nor any publicly held corporation owning any of its stock.

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OPINIONS BELOW

The District Court dismissed the Respondents as defendants on grounds of sovereign immunity and lack of diversity of citizenship. Clerk's Record 38, 66. Those orders are unpublished. *Cook v. Avi Casino Enterprises, Inc.*, No. 04-1079-PCT-PGR (U.S. Dist. Ct., Dist. Ariz.) The Ninth Circuit Court of Appeals decision held that diversity jurisdiction existed, but affirmed dismissal on the ground of sovereign immunity. App. A.[1] That opinion is published at *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008).

JURISDICTION

The case was disposed of in the District Court and in the Court of Appeals on grounds for which jurisdiction of this Court exists as set forth in 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Petitioners' reference to 18 U.S.C. § 1161 is raised for the first time in the Petition filed with this Court. That statute was never argued or considered

[1] All of the references herein to the Appendix are to the Petitioners' Appendix.

in any of the District Court proceedings nor in the Ninth Circuit appeal.

INTRODUCTION

Petitioners Cook ask this Court to decide whether a tribal corporation is entitled to sovereign immunity in an action alleging a violation of state dram-shop law. This Court should deny the Petition. In the lower courts, Petitioners advanced a single argument in opposing sovereign immunity: that a tribal corporation is not entitled to the sovereign immunity enjoyed by the tribe. The lower courts properly rejected that argument under a straightforward application of this Court's decision in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), which holds that a tribe's sovereign immunity extends to its commercial activities absent a clear waiver to the contrary.

Now, for the first time in the Petition for Certiorari, Petitioners advance a host of new arguments challenging sovereign immunity based on a reading of 18 U.S.C. § 1161 and alleging that sovereign immunity was waived. These arguments were not presented or passed on below; they are not the subject of a split of authority; and they are incorrect. Contrary to Petitioners' claims, the decision below was mandated by governing law and consistent with the holdings of sister circuits and state courts. Because

Petitioners' claims are waived, splitless, and meritless, this Court should deny the Petition.

STATEMENT OF THE CASE

As stated in his District Court complaint, Petitioner Christopher Cook ("Cook") lived and worked in California. Clerk's Record 1, ¶¶ 2, 11. During the early morning hours of May 25, 2003, he was driving his motorcycle across the Fort Mojave Indian Reservation, returning to California on his motorcycle after visiting his mother-in-law in Arizona. *Id.* ¶¶ 1, 13. According to the complaint, an off-duty employee (Christensen) was overserved and left the casino intoxicated. She allegedly used an Aví Resort & Casino shuttle bus to get to her car. While driving her own personal vehicle, Christensen crossed the center line of the tribal road, colliding with Cook on his motorcycle, causing him serious, permanent injuries. *Id.* ¶¶ 17-22. The accident occurred on "a part of the Fort Mojave Indian Reservation, along Aztec Road." *Id.* ¶ 13.

The Aví Resort & Casino facility is operated by Aví Casino Enterprises, Inc., which is a corporation of the Fort Mojave Indian Tribe (the "Tribe"), a federally recognized tribe. *Id.* ¶ 3. The Tribe's reservation (the "Reservation") straddles three states: California, Arizona, and Nevada. As acknowledged by Cook, the Aví Resort & Casino facility is located on the Nevada side of the Nevada-Arizona border. *Id.* ¶ 14. As noted

in the corporate articles (Sixth Article), the casino's gaming compact is not with Arizona, but with Nevada. Clerk's Record 13, Exhibit A; Clerk's Record 25, Exhibits 2, 4. Although never cited to in the record below, Cook's Petition (at 4) herein also notes that Aví Resort & Casino operates with a liquor license issued by the State of Nevada.[2]

Although the Aví Resort & Casino is located on the Tribe's Reservation, the corporation was formed on the Reservation pursuant to a Tribal ordinance, it is wholly owned and operated by the Tribe, and the accident occurred on the Reservation. Cook did not file any suit in Tribal court. Although Cook and two of the original individual defendants are California residents, California has no dram-shop law, and Cook did not file any complaint in the state or federal courts in California. Although Aví Resort & Casino is on the Nevada part of the Reservation, and the casino's gaming compact and liquor license are with Nevada, Nevada has no dram-shop law, and Cook did not file any complaint in the state or federal courts in Nevada. Instead, Cook filed his suit in Arizona, which has no nexus with the accident, but which does recognize dram-shop liability. Clerk's Record 1.

The Tribe itself was never named as a defendant in this case. To avoid an obvious lack of diversity of

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[2] The public record Petitioners now cite for the first time is for a liquor license issued by the State of Nevada two years *after* Cook's accident.

citizenship, Petitioners agreed to dismiss two defendant-employees who were California residents, like Cook. Clerk's Record 21. Along with court-directed supplemental briefing, Respondents filed motions to dismiss. Clerk's Record 13, 26, 47. The motions raised issues of diversity of citizenship, sovereign immunity, whether the Tribe was an indispensable party, and whether choice of law analysis would require application of Nevada law, where there is no dram-shop liability. Cook opposed the motion to dismiss with respect to the sovereign immunity question on the ground that Aví Casino Enterprises, Inc. was distinct from the Tribe itself and not entitled to sovereign immunity. The District Court held that sovereign immunity of the Tribe precluded suit against all Respondents and, alternatively, that Aví Casino Enterprises, Inc. had dual citizenship in Nevada and California, destroying diversity. Clerk's Record 38, 60. The District Court did not reach the issues of indispensable party or choice of law (both of which were asserted as cross-issues in the appeal to the Ninth Circuit).

The Court of Appeals held that, for diversity purposes, the business activities of Aví Casino Enterprises, Inc. were primarily in Nevada, and that it is, accordingly, a citizen of Nevada. App. A at 10a-11a. Having found that it had diversity jurisdiction over the matter, the Court of Appeals proceeded to the question of sovereign immunity and rejected the claim of Petitioners Cook that a tribal corporation does not enjoy tribal sovereign immunity. Citing this

Court's decision in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), as well as circuit precedent, the Court of Appeals held that Aví Casino Enterprises, Inc. was an arm of the Tribe and therefore entitled to the Tribe's sovereign immunity absent a clear waiver of that immunity. App. A at 16a. Finding no clear waiver, the Court of Appeals affirmed the dismissal of Petitioners' claims.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Determination that the Tribal Corporation Functions as an Arm of the Tribe and Has Sovereign Immunity Was Correct and Is Not the Subject of a Circuit Split.

The sovereign immunity issue as presented to the Court of Appeals was whether a tribal corporation is entitled to tribal sovereign immunity.[3] That question

[3] Cook urges (Petition at 23) that he did not sue the Tribe. That is not a distinction favoring Cook here. As urged below, the Tribe is an indispensable party. *See* Clerk's Record 47 at 5-9. Since the revenue of the Tribal corporation inures to the Tribe and is deposited in the Tribal treasury, no remedy could be fashioned without the Tribe, which cannot be joined because of its immunity. *See Kescoli v. Babbit*, 101 F.3d 1304, 1310-11 (9th Cir. 1996); *Kickapoo Tribe v. Lujan*, 728 F. Supp. 791, 796-97 (D.D.C. 1990). "The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Ransom v. St. Regis Mohawk Education & Community Fund, Inc* , 86 N.Y.2d 553, 559-60, 635 N.Y.S.2d 116, 120, 658 N.E.2d 989, 993 (1995).

barely appears in the Petition for Certiorari, but its absence is not surprising. The Court of Appeals' determination that the Tribal corporation, Aví Casino Enterprises, Inc., is entitled to sovereign immunity is plainly correct under this Court's precedent, and in line with numerous decision from other courts.

For "nearly two centuries," Indian tribes have been recognized as sovereign nations which have "territorial boundaries, within which their authority is exclusive, and have a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Each tribe exercises inherent authority over its members and territories, and jurisdiction over civil disputes arising on the reservation is specifically vested in the tribal court and governed by tribal law. *See Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

Inherent in that sovereignty is the affirmative defense of sovereign immunity. *United States v. USF&G Co.*, 309 U.S. 506, 512-13 (1940). Tribal sovereignty includes immunity from suit "absent a clear waiver by the tribe or congressional abrogation." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

This Court stated in *Kiowa* that sovereign immunity extends to a tribe's business activities, as well as its governmental functions.[4] No distinction is made "between governmental and commercial activities of a tribe," or whether they occur on or off the reservation. 523 U.S. 751, 754-55 (1998). Although the *Kiowa* Court recognized the breadth of its sovereign immunity ruling, it explicitly declined to revisit the issue and instead stated that it was up to Congress whether to continue to permit tribal sovereign immunity. *Id.*

Applying *Kiowa*, the Court of Appeals here held that the Tribal corporation's commercial character was not a bar to sovereign immunity so long as it functioned as an arm of the Tribe. The Court of

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[4] This Court has recognized that gaming as a tribal business activity is a governmental function promoting the self-determination of Indian tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987) ("[T]ribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.") Congress also has recognized the importance of gaming enterprises to tribal self-governance The Indian Gaming Regulatory Act, which governs all Indian gaming, requires that revenues from gaming be used only "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B).

Appeals correctly concluded that this was the case. As the Court of Appeals explained, the corporation was created "pursuant to a tribal ordinance and intergovernmental agreement" and is "wholly owned and managed by the Tribe." Furthermore,

> the economic benefits produced by the casino inure to the Tribe's benefit because [its] articles of incorporation state that all capital surplus from the casino shall be deposited in the Tribe's treasury and because the Tribe, as the sole shareholder, enjoys all of the benefits of an increase in the casino's value.

App. at 14a. In addition, a majority of the Tribal corporation's board members must be Tribe members, and the "Tribe's council performs corporate shareholder functions for the benefit of the Tribe." *Id.*[5]

The Court of Appeals' conclusion that the Tribal corporation was entitled to sovereign immunity on these facts is consistent with its prior authority and a host of cases from around the country finding sovereign immunity appropriate under similar circumstances.

> With the Tribe owning and operating the Casino, there is no question that these

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[5] *See also* Clerk's Record 25, Exhibit 3. Additionally, the bylaws include a section entitled "Sovereign Immunity" and provide that Aví Casino Enterprises can only waive its sovereign immunity in a contract or written obligation, and that "[t]he corporation retains its sovereign immunity to the extent not expressly waived within said instrument, contract or other written obligation." *See* Clerk's Record 54, Exhibit A.

> economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. . . . ***In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.***

Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006), *cert. denied*, 549 U.S. 1231 (2008) (emphasis added). *See Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) ("immunity extends to subdivisions of a tribe, and even bias suits arising from a tribe's commercial activities"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"). *See also Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 169, 129 P.3d 78, 80 (Ct. App. 2006); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 638-42, 84 Cal. Rptr. 2d 65, 69-71 (1999); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294-96 (Minn. 1996); *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 559, 635 N.Y.S.2d 116, 119, 658 N.E.2d 989, 992 (1995); *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash. 2d 108, 112-13, 147 P.3d 1275, 1279 (2006).

As acknowledged by the Ninth Circuit in this case, the "arm of the Tribe" concept is similar to the "arm of the state" concept discussed in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), which decided whether a state instrumentality could invoke the state's sovereign immunity.[6] In *Regents*, the plaintiff sought to sue the state university, through its regents, for an alleged violation of a contract to employ him. The university maintained that pursuant to the Eleventh Amendment, it was immune from such suit in federal court. This Court agreed.

> It has long been settled that the reference to actions "against one of the United States" encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities. . . . Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Id. at 429 (citations omitted).[7]

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[6] "[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens." *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 765 (2002).

[7] *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (where the sovereign immunity was of the United States

(Continued on following page)

"When deciding whether a state instrumentality may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question." *Id.* The relationship between the Tribe and Aví Casino Enterprises, Inc. has been stated above. The corporation is not a mere business. It was created under tribal law and is wholly owned and managed by the Tribe through its Tribal Council. The corporation is a device (an arm of the tribe)[8] through which the Tribe carries out part of its tribal functions. The economic benefits of the corporation are required to inure to the Tribe. Cook's damages suit against the Tribal corporation "is in essence one for the recovery of money from the [Tribe], [so] the [Tribe] is the real, substantial party in interest and is entitled to invoke its sovereign immunity." *Id. See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("here the College serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity"); *Duke v. Absentee Shawnee Tribe Housing Authority*, 199 F.3d 1123, 1125-26 (10th Cir. 1999)

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and the court said naming individual officers or employees did not change that it was really a suit to collect from the government and barred).

[8] When an Indian tribe and a corporation considered an "arm of the tribe" sought to be recognized as "persons" for purposes of a federal statute, this Court denied such status to both the tribe and its corporation, with no distinction between the two, because both were sovereign entities, in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701, 704 & 705 n.1 (2003).

(housing authority was "an enterprise designed to further the economic interests of the Absentee Shawnee tribe," so exempt from the asserted federal law); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (health corporation created and controlled by tribe "served as an arm of the sovereign tribes, acting as more than a mere business," so entitled to tribal immunity); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) ("we must treat the Authority as a tribal agency rather than a separate corporate entity created by the tribe"); *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (age discrimination law inapplicable to construction company chartered and wholly owned by tribe).

Cook has no argument other than to claim that *Kiowa* involved a contract or that *Kiowa* should be revisited by this Court. The notion that *Kiowa* was limited to commercial contracts is belied by the opinion's language, which explicitly envisioned sovereign immunity for "torts," and by the host of cases, cited above, applying it in a variety of actions, including tort cases. As for Cook's request to revisit *Kiowa*, this Court has already decided in that case that questions of sovereign immunity are appropriately addressed to Congress. There is no warrant for the Court to now reconsider its judgment on that point.

II. Petitioners' Principal Arguments Regarding Regulation of Alcohol Were Not Presented or Passed on Below, Do Not Create any Split of Authority, and Are Meritless.

Perhaps recognizing that the issues raised below are an entirely inadequate basis for granting the Petition, Petitioners advance an entirely new set of arguments before this Court. Petitioners now contend that Congress has abrogated the sovereign immunity of tribes with respect to state liquor laws under 18 U.S.C. § 1161, and that Respondents have waived sovereign immunity in any event. Neither of these grounds was presented to nor passed upon by the lower courts. (Indeed, the lower courts expressly noted that Cook had not made a waiver argument.)[9] Petitioners' failure to present these arguments below is an independently sufficient basis to deny the Petition because this Court "ordinarily do[es] not consider claims that were neither raised nor addressed below." *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007). *See also Clingman v. Beaver*, 544 U.S. 581, 598 (2005); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970). Even if this Court were inclined to consider Petitioners' arguments (and it should not), there

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[9] App. A at 15a & n.6; Clerk's Record 60 at 7 n.7.

would still be no persuasive basis for granting the Petition.

A. Congress Did Not Unequivocally Abrogate Tribal Sovereign Immunity from a Private Tort Damages Suit Merely by Allowing a State to Exert Regulatory Authority Over Alcohol Transactions.

Petitioners argue at length that the decision of the Court of Appeals conflicts with *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), a dram-shop liability case decided by the Oklahoma Supreme Court. That is incorrect. In *Bittle*, the Oklahoma court concluded that 18 U.S.C. § 1161 resulted in a waiver of tribal sovereign immunity with respect to alcohol-related transactions. That holding plainly does not conflict with the decision below because Cook never presented any argument based on 18 U.S.C. § 1161, and thus the Court of Appeals issued no "conflicting" ruling concerning it here. In any event, *Bittle* also was wrongly decided.

Congressional authorization for suit against a tribe "cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[10] When faced with a claim that Congress has statutorily waived a tribe's immunity,

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[10] The same language is used in determining whether there has been Congressional abrogation of sovereign immunity of the states. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

courts should "tread lightly in the absence of clear indications of legislative intent." *Id.* at 60.

There is no federal statute which specifically eliminates an Indian tribe's immunity from liability for damages in a private law suit under a state dram-shop statute. Cook argues here that Congress has ***impliedly*** abrogated tribal sovereign immunity from private tort actions under state dram-shop laws and 18 U.S.C. § 1161 as applied in *Rice v. Rehner*, 463 U.S. 713 (1983).

In *Rice v. Rehner*, this Court held that there was no tradition of tribal sovereign immunity in the context of licensing and transactions for the distribution of alcoholic beverages. It did not address whether an individual could maintain a private action for damages against a tribe. The Court also found that the legislative history of 18 U.S.C. § 1161 indicated that Congress had intended to allow state law to apply to the regulation of tribal alcohol transactions. 463 U.S. at 726. That same legislative history discloses no intent that tribes be subject to private causes of action and civil damage suits for dram-shop liability.[11]

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[11] The sections referred to within 18 U.S.C. § 1161 are all federal criminal statutes. The statute contains no express or implied waiver for private dram-shop actions in state court. It does not even mention tribal immunity. Allowing a state to enforce its liquor regulations by allowing state court prosecutions of Indians for violations occurring on a reservation has no

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Rice is a regulation case. Sovereign immunity was not in issue. The background facts of the *Rice* case are instructive on the limits of the Court's holding. *Rice* did not involve a claim against a tribe, a tribal enterprise, or a tribal employee, much less a tort claim arising from an automobile accident or under a state dram-shop law. It did not involve a private action for damages at all. Rather, in *Rice*, an individual Indian trader brought a declaratory judgment action against the Director of the California Department of Alcoholic Beverage Control to determine whether the state could require the trader to obtain a state liquor license to sell alcohol on Indian lands. This Court resolved only the narrow question of "whether the State of California may require a federally-licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption." 463 U.S. at 715. The Court held that California could require the trader to obtain a state liquor license to sell alcohol on Indian lands. This exercise of regulatory authority does not imply an abrogation of sovereign immunity for tribes or tribal enterprises.

Cook suggests that private dram-shop actions are part of the type of state regulation of alcohol-related

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bearing on whether a tribe can be subject to a suit in state court for monetary damages for negligently overserving alcohol.

activities of Indian tribes.[12] This proposition, however, conflates the distinction recognized in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. . . . To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . ***There is a difference between the right to demand compliance with state laws and the means available to enforce them.***

523 U.S. at 755 (emphasis added). State regulation of alcohol transactions permitted by 18 U.S.C. § 1161 does not involve a loss of tribal sovereign immunity from suit.

As noted in *Kiowa*, the distinction between being subject to state regulation and being subject to a damages suit is illustrated by a series of cases involving cigarette sales. Those cases established that a state may regulate the on-reservation sale of cigarettes to non-Indians with respect to the state's tax laws. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of the Colville*

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[12] Although alcohol regulation is a valid exercise of the state's police power, the state cannot delegate its police powers to individuals. Allowing governmental regulation by a state is not the same as allowing private causes of action by individuals for money damages.

Indian Reservation, 447 U.S. 134 (1980), "hold that if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers." *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985). *Chemehuevi* held that the state could require the tribe to collect an excise tax on cigarettes sold to non-tribal members, but the lower court's holding that the tribe itself was immune from any counterclaim for taxes due was not disturbed. *Id.* In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991), the state sought to extend the aforementioned holdings to require the tribe to pay to the state certain uncollected cigarette taxes. This Court again held that the state was permitted to impose taxes on the tribe's cigarette sales to non-tribal members, but sovereign immunity was applied to bar the tax on sales to tribal members and any counterclaim by the state to collect from the tribe for uncollected back taxes or to enjoin future tax-free sales.[13] "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." *Id.* at 514 (noting among the alternatives that the

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[13] Thus, the fact that a state regulatory law may apply to a sovereign tribe does not necessarily mean that state (or federal) court jurisdiction follows as a matter of course. "[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000)

state could seek the tax from cigarette suppliers to the tribe, or seize cigarettes off the reservation, or negotiate a mutually acceptable agreement with the tribe).

The only other cases examining 18 U.S.C. § 1161 in circumstances similar to *Bittle* have all concluded that it does not result in a waiver of tribal sovereign immunity with respect to a private right of action for tort damages. *See Foxworthy v. Puyallup Tribe of Indians Ass'n*, 141 Wash. App. 221, 231-32, 169 P.3d 53, 58 (2007);[14] *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 172, 129 P.3d 78, 83 (Ct. App. 2006);[15] *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. Ct. App. 1997).[16]

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[14] *Foxworthy* was a case involving an injured motorist who sought in state court to sue the tribe operating a casino where the intoxicated driver who collided with the plaintiff was alleged to have been overserved alcohol. The Washington Court of Appeals held that the tribe's inherent sovereign immunity from private tort actions was not abrogated nor waived because of the state's authority to tax or otherwise regulate alcohol sales on the reservation pursuant to 18 U.S.C. § 1161. 141 Wash. App. at 232-34, 169 P.3d at 58-59.

[15] In *Filer*, the Arizona Court of Appeals concluded that 18 U.S.C. § 1161 did not abrogate tribal sovereign immunity with regard to litigation related to dram-shop act violations and that *Rice v. Rehner* was distinguishable because it did not address a private right of action to enforce a state law against Indian tribes. *Filer*, 212 Ariz. at 171-72, 129 P.3d at 82-83.

[16] In *Holguin*, the Texas Court of Appeals held that 18 U.S.C. § 1161 did not abrogate tribal immunity from a private dram-shop lawsuit for damages in state court even if the statute subjected the tribe to state liquor regulation. 954 S.W.2d at 854.

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Hence, accepting for purposes of argument that a state's dram-shop law might be considered a part of its exercise of the police power with respect alcohol enforcement, it still does not follow that a tribe which is subject to the state's regulatory laws for alcohol transactions is also subject to a private party's suit for damages for negligence or an alleged violation of such a regulatory law. "[T]he right to demand compliance with state [alcohol] laws" does not mean that private damage suits are among "the means available to enforce them." *Kiowa*, 525 U.S. at 755.[17] Indian tribes have a history of sovereign immunity from liability from damage suits, including private tort

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The court also held that tribal sovereign immunity barred private suits for personal injuries resulting from noncompliance with the Texas Dram Shop Act. *Id.*

[17] As the Arizona Court of Appeals said in *Filer*:

> Thus, a state's power to regulate certain tribal activities and its ability to bring a lawsuit against a tribe in state or federal court are not necessarily coextensive. That is to say, sovereign immunity may bar the latter but not the former. And a private suit, even if deemed a valid exercise of the state's regulatory power, is subject to the same limitations. As the Gaming Enterprise argues, "[i]f a state cannot directly enforce its alcohol laws against a tribe in a civil suit in federal court, then a private party certainly cannot prosecute a suit for monetary damages against a tribe in state court."

212 Ariz. at 172, 129 P.3d at 83 (citing *Holguin*). *See also Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 387, 105 Cal. Rptr. 2d 773, 775 (2001) ("a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe").

actions, and the fact that tribes have been subject to regulation in some instances has not been accompanied by a wholesale abrogation of their immunity from suit.

B. The Tribe Did Not Unequivocally Waive Its Sovereign Immunity from a Private Tort Damages Suit.

Cook also argues for the first time[18] in the Petition that Respondents waived sovereign immunity. That argument is also incorrect.

Waiver requires the intentional relinquishment of a known right. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizens Band Potawatomi Tribe*, 532 U.S. 411, 418 (2001).[19] *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe"). Even if this Court were willing to overlook Petitioners' failure to raise a waiver argument below,

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[18] Both lower courts noted Cook's failure to make a record on waiver. App. A at 15a & n.6; Clerk's Record 60 at 7 n.7.

[19] A similar requirement applies with respect to the sovereign immunity of the United States. "Such waiver cannot be implied, but must be unequivocally expressed." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

there has been no clear waiver by the Tribe of its sovereign immunity with respect to Cook's tort claim.

Cook's Petition (at 22) only argues that the Tribe impliedly waived its immunity by incorporating its business enterprise as Aví Casino Enterprises, Inc. That is not an express waiver. To the contrary, as previously noted, the Tribal corporation's bylaws expressly disclaim any intent to waive sovereign immunity. *See* Restated Bylaws, Section 5.6, Clerk's Record 54, Exhibit A.

Cook merely suggests (Petition at 4) that by accepting a state liquor license, the Tribe somehow waived its sovereign immunity and agreed to be bound by state liquor laws, including dram-shop laws.[20] This is another argument for waiver by implication and would not constitute the "clear" waiver required to be shown.

First, Aví Resort & Casino operated pursuant to a gaming compact with Nevada and a liquor license issued by Nevada. To the extent Cook's argument depends upon a purported waiver by the Tribe, this hypothetical waiver must be for the purpose

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[20] According to *Kiowa*, 523 U.S. at 756, "tribal immunity is a matter of federal law and is not subject to diminution by the states," so it would seem incongruous to find that by Arizona enacting a dram-shop law, somehow the Tribe here is deemed to have waived any immunity as a result of receiving a liquor license from Nevada which has no dram-shop law.

of applying Nevada law, not Arizona law.[21] Hence, even if 18 U.S.C. § 1161 required application of the "laws of the state," here, as Cook acknowledges in the Petition (at 18, n.40), that would be Nevada which has no dram-shop law.

Second, as discussed with regard to *Rice v. Rehner* above, this hypothetical waiver would be with respect to the licensing and regulation of liquor transactions.[22] There has been no intentional relinquishment of the right to be immune from private causes of action for tort damages.

As already stated, Cook failed to make any waiver argument below, which was noted by both the District Court and the Ninth Circuit. To the extent

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[21] Cook's Petition (at 18-19), seeks to convert this to an undecided conflict of laws question, but the Arizona state court decision has rendered that question moot. The Arizona court found that the accident involved a California plaintiff, accusing a Tribal entity and Tribal employees of overserving alcohol on the Reservation, allegedly contributing to a collision which occurred on the Reservation. Those same factors leading to a determination of no personal jurisdiction of the Arizona court also illustrate that if any state law applies, it would be Nevada – a state with no dram-shop liability.

[22] In *Potawatomi*, it was the tribe which had initiated a suit against the state to enjoin it from assessing the cigarette tax. This Court held that such an action nevertheless did not waive the tribe's sovereign immunity with respect to the counterclaim in which the state sought to collect the unpaid taxes. 498 U.S. at 509-10. *See also World Wide Minerals v. Kazkhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) ("waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires.'").

Cook now seeks to make such an argument, it should not be considered. In any event, there is nothing in the record which shows the requisite clear, unequivocal waiver of sovereign immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 26, 2009